

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: January 19, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hill's Pet Nutrition, Inc.
v.
PMI Nutrition, Inc.

Opposition No. 91150380
to application Serial No. 78054552
filed on March 22, 2001

Kandis M. Koustenis of Goodwin Procter LLP for Hill's Pet
Nutrition Inc.

Jeffrey L. Michelman of Blumenfeld, Kaplan & Sandweiss, P.C.
for PMI Nutrition Inc.

Before Rogers, Kuhlke and Walsh, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, PMI Nutrition, Inc., seeks registration of
the mark SUPERIOR NUTRITION FOR EXCEPTIONAL PETS (in
standard character form) for goods identified in the
application as "pet food" in International Class 31.¹

¹ Serial No. 78054552, filed March 22, 2001, alleging January 31,
2001 as the date of first use and first use in commerce.
Trademark Act Section 1(a), 15 U.S.C. §1051(a).

Opposer, Hill's Pet Nutrition, Inc., opposed registration of applicant's mark, on the grounds that, as applied to applicant's goods, the mark so resembles opposer's previously used, registered and famous marks² SUPERIOR NUTRITION FOR THE LIFE OF YOUR PET and SUPERIOR NUTRITION FOR THE LIFELONG HEALTH OF YOUR PET for pet food products as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d).³

Applicant filed an answer by which it denied the salient allegations of the notice of opposition.⁴

The evidence of record consists of the pleadings herein; the file of the opposed application; the testimony

² Opposer pleaded two applications which matured into registrations during the course of this proceeding. Opposer submitted, under notice of reliance, status and title copies of these registrations in support of, inter alia, its allegations of standing and priority. Inasmuch as applicant has not objected, and opposer pleaded the underlying applications in its notice of opposition, we deem the notice of opposition amended to include these registrations and consider them for the purposes for which they have been submitted. These registrations are discussed in detail infra.

³ The notice of opposition also references a claim of false suggestion of a connection under Section 2(a) of the Trademark Act and dilution under Section 43(c) of the Trademark Act. However, these claims were not sufficiently pleaded and opposer did not pursue these claims in its brief. In view thereof, the Board considers the false suggestion and dilution claims to have been waived.

⁴ Applicant's answer also contained several affirmative defenses, including an allegation of a prior registration owned by applicant. However, inasmuch as applicant did not take testimony, submit evidence or file a brief, these affirmative defenses are considered to have been waived.

deposition (with exhibits) of Mr. John Munchoff, opposer's Director of Marketing. In addition, opposer submitted, under a notice of reliance, status and title copies of opposer's pleaded registrations.

The pleaded registrations, all of which are in full force and effect and owned by opposer, are summarized as follows:

Registration No. 2527991 for the mark SUPERIOR NUTRITION FOR THE LIFE OF YOUR PET (in standard character form) for animal foods for dogs, cats, and other domesticated household pets in International Class 31, filed February 25, 1999, issued January 8, 2002; and

Registration No. 2550682 for the mark SUPERIOR NUTRITION FOR THE LIFELONG HEALTH OF YOUR PET (in standard character form) for veterinarian-supervised dietary pet food in International Class 5, printed leaflets and brochures concerning pet care and nutrition in International Class 16, and pet food in International Class 31, filed October 19, 1999, issued March 19, 2002.

Because opposer has made its pleaded registrations of record by way of notice of reliance, opposer has established its standing to oppose registration of applicant's mark and its priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ

563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the second, third and fourth du Pont factors, i.e., the similarities between opposer's and applicant's goods and the similarities between opposer's and applicant's trade channels and classes of purchasers of these goods. We must make our determinations under these factors based on the goods as they are recited in the application and registrations, respectively. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

The goods need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's*

Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

"Pet food," as identified in the application is identical to "pet food," as identified in Registration No. 2550682, and legally identical to "animal foods for dogs, cats, and other domesticated household pets," as identified in Registration No. 2527991. Further, given the absence of any restrictions or limitations in the parties' respective identifications of goods, and because the parties' respective goods are identical they are deemed to be marketed in the same trade channels and to the same classes of purchasers. Kangol Ltd. V. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Finally, the parties' respective goods are ordinary consumer items which would be purchased without a great deal of care, by ordinary consumers. These findings under the second, third and fourth du Pont factors all weigh significantly in opposer's favor in our likelihood of confusion analysis.

We turn next to the first du Pont factor, i.e., whether applicant's mark and opposer's marks are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles. The test, under this du Pont factor, is not whether the marks can be distinguished when subjected to a

side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Finally, we note that where the goods are identical "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1992).

Applicant's mark, SUPERIOR NUTRITION FOR EXCEPTIONAL PETS, and opposer's marks, SUPERIOR NUTRITION FOR THE LIFE OF YOUR PET and SUPERIOR NUTRITION FOR THE LIFELONG HEALTH OF YOUR PET are depicted in standard character form. The respective marks are slogans and have the same construction, beginning with the words SUPERIOR NUTRITION FOR and ending with the word PET (the plural form in applicant's mark does not create a difference). Thus, the commercial impression of the marks is quite similar as is the connotation, which conveys a similar message in relation to the goods, i.e., high quality, nutritious food for your pet. Therefore, despite the difference in the words that appear in the

middle of the slogans, the commercial impression and general connotation of these marks create confusingly similar marks such that, and in particular given the identical goods, the similarities outweigh the differences. We conclude that the parties' marks are substantially similar.

Considering the respective marks in their entireties, we conclude that the evidence of record as it pertains to the relevant du Pont factors clearly supports a finding of likelihood of confusion as to the marks in opposer's Registration Nos. 2527991 and 2550682 and that registration of applicant's mark, therefore, is barred under Trademark Act Section 2(d).⁵

Finally, to the extent there is any doubt with regard to the question of likelihood of confusion, such doubt must be resolved in favor of opposer, the prior registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 USPQ2d 1001, 1003 (Fed. Cir. 2002) ("This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks"); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The opposition is sustained.

⁵ In view of our finding of likelihood of confusion, we do not reach opposer's assertion of fame of its "SUPERIOR" marks.